(10)

No. 94-6615

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

CARL THOMPSON,

*Petitioner*,

*vs.*

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General, State of Alaska,

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

1. When a defendant seeks to exclude a pretrial statement on *Miranda* grounds and the trial judge finds he was not in custody, what standard of review applies to that finding?

2. Can a person be in custody, for the purpose of the *Miranda* rule, when the police have neither physically restrained him nor commanded him to remain?

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### INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on the final judgment of a state trial court based on an issue relating to the applicability of a prophylactic rule. The unnecessary relitigation of such issues is contrary to the rights of victims and society which CJLF was formed to advance.

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1. Both parties have consented to the filing of this brief.

## SUMMARY OF FACTS AND CASE

On September 10, 1986, the body of Dixie Thompson, petitioner's ex-wife, was found floating in a lake. She had been stabbed 29 times and beaten severely. Brief in Opposition 1-2. On September 11, 1986, following a press release requesting the public's help in identifying the body, Thompson called police and told them that the description of the body matched that of his former wife, whom he had last seen in August. Thompson called again the next day and was told that the body was indeed his former wife's. *Id.*, at 2.

On September 15, 1986, Sergeant Stockard requested that Thompson come to trooper headquarters to identify some of Dixie's personal belongings. *Id.*, at 2-3. At this point, troopers suspected Thompson as the killer. *Id.*, at 3. Petitioner drove his own truck to headquarters, where he identified the items. Brief for Petitioner 2. He was then questioned for two hours, during which he was told several times that he was not under arrest and could leave at any time. Brief in Opposition 3. Sergeant Stockard did not advise Thompson of his *Miranda* rights because he had no intention of arresting Thompson and did not feel he was in custody. *Id.*, at 3.

Thompson initially denied involvement in his ex-wife's death. After being informed of the evidence against him, he finally admitted to killing her and gave troopers his description of what happened. *Id.*, at 3-4. Following the interview, Thompson's truck was impounded and Thompson was driven home, where he was arrested nearly two hours later. *Id.*, at 4.

Thompson was indicted for first-degree murder and tampering with physical evidence. Brief for Petitioner 3. His motion to suppress his confession on the basis of a *Miranda* violation was denied by the trial judge, who found that Thompson was not in custody when he confessed. *Id.*, at 3-4. He was convicted of both crimes. *Id.*, at 4-5.

The Alaska Court of Appeals affirmed Thompson's conviction and the admission of his confession, finding that Thompson was not in custody and *Miranda* was inapplicable. *Id.*, at 5. The Alaska Supreme Court denied review. On petition to the federal District Court for a writ of habeas corpus, Thompson argued that admission of his confession violated *Miranda*. *Id.*, at 5. The District Court denied the writ, concluding that the state court's finding that petitioner was not in custody was entitled to a presumption of correctness under 28 U. S. C. § 2254(d). *Id.*, at 6. The Ninth Circuit affirmed on the same basis. *Ibid.*



## SUMMARY OF ARGUMENT

When *Miranda* became the primary means by which the admissibility of a confession was determined, it was intended to simplify the law. Repeated *de novo* review of the custody question thwarts this purpose. A finding of custody is a fact-specific determination. It is usually an easy question for a court, and even when it is not, *de novo* review is not required. Unlike the issue of voluntariness, there are no *stare decisis* issues affecting its designation. There are no constitutional impediments to entrusting trial courts with the custody issue; like many other factual issues, a trial judge is better equipped to decide it.

If this Court decides that custody should be a question of law, then it should further narrow the definition of custody such that it requires a seizure. This will enhance the clarity of *Miranda* and make the presumption of coercion more accurate.

If Congress passes habeas reform before this case is argued, this Court should take supplemental briefing on the effect of that legislation.

## ARGUMENT

### I. Custody should be a factual determination made by the trial court, reviewed for clear error on appeal and entitled to deference on habeas corpus.

Under *Miranda* v. *Arizona*, 384 U. S. 436, 468 (1966), the only inquiry when seeking to admit a statement made during custodial interrogation is whether the suspect was informed of his constitutional rights. Speculation on the facts and circumstances surrounding the interrogation is irrelevant, as is the suspect's prior knowledge of his rights. *Ibid.*

Thus, *Miranda* created a mandatory, conclusive presumption that all custodial interrogation was "inherently compelling" under the Fifth Amendment and required the exclusion of any statement made under such circumstances unless appropriate warnings had been given. *Id.*, at 476-477. Both custody and interrogation are required to evoke the presumption; the most intense questioning need not be preceded by warnings if the suspect is not in custody. See *Oregon* v. *Elstad*, 470 U. S. 298, 309 (1985).

The *Miranda* Court did not define "custody." In fact, this Court has acknowledged that "the task of defining 'custody' is a slippery one," such that application of the *Miranda* rule by police officers could not be expected to be error free. *Id.*, at 309. At the same time, the *Miranda* decision was intended "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda*, *supra*, 384 U. S., at 441-442.

The inherent dichotomy between the rule's purpose and its application with respect to custody has resulted in confusion among both state and federal appellate courts. Making custody a question of fact will reduce this problem and better serve the interests *Miranda* was designed to protect.

*A. The Purpose of Miranda.*

The *Miranda* decision was intended to curtail the intensely coercive tactics used by police officers to elicit confessions from suspects who were "in custody or otherwise deprived of [their] freedom of action in any significant way." *Id.*, at 445. The Court prefaced its decision by noting that "[a]n understanding of the nature and setting of this in-custody interrogation is essential to our decisions today." *Ibid.* It then described such third-degree tactics as "beating, hanging, [and] whipping" and cited a recent New York case in which "police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party." *Id.*, at 446.

Such techniques, although undoubtedly exceptions to the rule, were "sufficiently widespread to be the object of concern." *Id.*, at 447. The Court felt that "[u]nless a proper limitation



upon custodial interrogation is achieved . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future." *Ibid.* The decision, however, focused more on psychological police tactics than on physical brutality in determining the potential for coercion. See *id.*, at 448, 455-456.

The environment in which a suspect is placed is a decisive factor in evaluating coercion. As both the police manuals and this Court emphasized, privacy is of utmost importance in eliciting a confession. *Id.*, at 449-451. While held in solitary detention, the pre-*Miranda* suspect was interrogated, sometimes for days, "with no respite from the atmosphere of domination." *Id.*, at 451. Regardless of the method of interrogation, the overriding constant is the restriction on the suspect's freedom to leave.

It was during this state of the law, in which an uneducated, perhaps mentally disturbed suspect with no knowledge of his constitutional rights, could be arrested, isolated, and interrogated until he confessed, that *Miranda* was decided. Although the Court noted that such confessions may not necessarily be involuntary "in traditional terms," warnings were required, given the "compulsion inherent in custodial surroundings . . . ." *Id.*, at 457-458.

It bears noting what type of custodial interrogation the four petitioners in *Miranda* underwent. Petitioner Vignera was "picked up" by police and taken to the police station; the others were formally arrested prior to interrogation. *Id.*, at 491-497. Present in all cases were "salient features—incommunicado interrogation of individuals in a police-dominated atmosphere . . . ." *Id.*, at 445. It was this type of inherently coercive questioning the Court sought to regulate.

Prior to *Miranda*, the admissibility at trial of a defendant's statement to the police was a due process issue that depended on whether the statement was voluntary under the totality of the circumstances. *Michigan* v. *Tucker*, 417 U. S. 433, 441 (1974). Following *Miranda*, the issue was whether a suspect had been given the prescribed warnings under appropriate circumstances. Hence, the coexistence of custody and interrogation emerged as the main point of contention in determining the admissibility of a confession.

Although the focus has shifted, the rationale for exclusion remains the same. Under either inquiry, official coercion is the danger which exclusion seeks to remedy; where such coercion is not present, the rationale for exclusion is weak and serves more to impede the fact-finding process than to protect constitutional rights.

To qualify for exclusion, a confession must be the product of official compulsion. The absence of "the essential link between coercive activity of the State . . . and a resulting confession by the defendant" removes a confession from the category of inadmissible evidence under either a due process or a *Miranda* analysis. *Colorado* v. *Connelly*, 479 U. S. 157, 165-167, 170 (1986). Thus, the confession of an insane man is not excluded by the *Miranda* rule, even if he is compelled by inner voices to confess, as long as the voices are not those of law enforcement. *Id.*, at 170-171. "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *United States* v. *Washington*, 431 U. S. 181, 187 (1977).

Coercion is generally not presumed; it is the "interaction of custody and official interrogation" that warrants a presumption of compulsion. *Illinois* v. *Perkins*, 496 U. S. 292, 297 (1990). That a confession was unwarned is by itself insufficient to evoke the presumption. *Elstad*, *supra*, 470 U. S., at 314.

"A *Miranda* violation does not *constitute* coercion, but rather affords a bright-line, legal presumption of coercion . . . ." *Id.*, at 307, n. 1 (emphasis in original). The type of custody required to implicate *Miranda* must be of the sort that will enable the court to presume coercion. This is why an officer's intentions to arrest the suspect are only relevant if they are communicated, otherwise, it does not affect how a reasonable person in the suspect's situation would view his freedom. *Stansbury* v. *California*, 128 L. Ed. 2d 293, 299-300, 114 S. Ct. 1526, 1529-1530 (1994) (*per curiam*).

Although the presence of coercion may render a confession involuntary under due process considerations, it alone does not implicate *Miranda*. Any interview with a suspect will contain elements of coercion. *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977) (*per curiam*). "*Miranda* warnings are required only



where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." *Ibid.* (emphasis in original).

In cases in which a suspect has voluntarily agreed to answer questions and subsequently attempted to suppress the answers, this Court has uniformly held, with no more than a cursory discussion of what constitutes custody, that no warnings are required. *California* v. *Beheler*, 463 U. S. 1121, 1124 (1983) (*per curiam*); *Mathiason*, *supra*, 429 U. S., at 495; *Roberts* v. *United States*, 445 U. S. 552, 561 (1980).

It is involuntary, coerced statements that this Court sought to exclude via the *Miranda* rule. "The absence of *Miranda* warnings does not, by some mysterious alchemy convert a voluntary and trustworthy statement into an involuntary and unreliable one." *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 430, 113 S. Ct. 1745, 1762 (1993) (O'Connor, J., dissenting). When the evidence weighs heavily against an involuntariness claim, as when a trial court has found the defendant free to leave, a confession should be admitted. Allowing the relitigation of a custody issue the trial court has already ruled on is constitutionally unnecessary and stretches *Miranda* across ground it was never intended to cover.

*B. Miranda's Limits and the Definition of Custody.*

*Miranda* reigns within the small and closely guarded territory of custodial interrogation; it is not the governing doctrine outside those borders. This Court has stated that "the decision as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights," *Moran* v. *Burbine*, 475 U. S. 412, 424 (1986), and has refused to sanction its expansion. See *New York* v. *Quarles*, 467 U. S. 649, 658 (1984).

The *Miranda* Court was careful to point out what its decision did not encompass. It recognized that "[c]onfessions remain a proper element in law enforcement" and specifically preserved "general questioning of citizens in the fact-finding process" as outside the scope of the decision. *Miranda*, *supra*, 384 U. S., at 477-478. Likewise, the police are free, as part of their

investigation, to conduct "inquiry of persons not under restraint," and any statements one makes while not in custody are admissible, notwithstanding a lack of warnings. *Ibid.*

Generally, when one is questioned by government agents, he is considered to have answered voluntarily unless he claims the Fifth Amendment privilege. See *Minnesota* v. *Murphy*, 465 U. S. 420, 429 (1984). Custodial interrogation is an exception to this rule. *Ibid.* Its warning requirement is an "extraordinary safeguard [which] 'does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.' " *Id.*, at 430 (quoting *Roberts* v. *United States*, 445 U. S. 552, 560 (1980)).

Custodial interrogation is not an arbitrary cutoff point for the requirement of warnings; it is when the "adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system . . . ." *Miranda*, *supra*, 384 U. S., at 477. It was the "incommunicado, police-dominated atmosphere," the "relentless questioning," and "depriv[ation] . . . of any outside support" associated with it that the *Miranda* Court found inherently compelling. *Id.*, at 455-456.

The *Miranda* Court did not provide a bright-line definition of custody. It held that warnings were necessary when the suspect was "in custody at the station or otherwise deprived of his freedom of action in any significant way." *Id.*, at 477. Later cases have defined custody as "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Beheler*, *supra*, 463 U. S., at 1125 (quoting *Mathiason*, *supra*, 429 U. S., at 495).

In the almost 30 years since the *Miranda* decision, no court has provided a workable, bright-line definition of custody. This Court has, however, more clearly outlined *Miranda*'s boundaries and its applicability. Subsequent decisions have chiseled away at the broad definition of custody and made it more accessible to trial courts. Although there remains a gray area in which the custody determination may be unclear as a matter of law, that area has shrunk to where it is extremely fact-specific.

One case which significantly limited the definition of custody is *Berkemer* v. *McCarty*, 468 U. S. 420 (1984), in which the Court held that a traffic stop, although a seizure, does not



amount to custody for the purposes of *Miranda*. *Id.*, at 440. The Court indicated that *Miranda* was to be strictly enforced, "but only in those types of situations in which the concerns that powered the decision are implicated." *Id.*, at 437. Although he was certainly subjected to "some pressure," the suspect was not "completely at the mercy of the police," and warnings were unnecessary. *Id.*, at 438.

This Court has laid down other bright-line rules excluding certain situations from the definition of custody. A prison inmate is under no compulsion and therefore not in custody for purposes of *Miranda* when the interrogator is an undercover police officer posing as a fellow inmate. *Illinois* v. *Perkins*, 496 U. S. 292, 296 (1990). A witness before a grand jury is also not in custody while testifying, even if that witness is a suspect in the investigation. *United States* v. *Mandujano*, 425 U. S. 564, 580 (1976).

The Court has also furnished bright-line rules requiring a finding of custody under certain circumstances. Once a suspect has been arrested, he is in custody for *Miranda* purposes, regardless of where the arrest takes place. See *Orozco* v. *Texas*, 394 U. S. 324, 327 (1969). A suspect in custody for any crime may not be interrogated, even on a completely unrelated crime, without first being advised of his rights. *Mathis* v. *United States*, 391 U. S. 1, 4-5 (1968).

In other areas, this Court has declined to draw bright lines within the definition of custody, presumably so as to not unduly restrict it. The questioning of a suspect at the police station, although admittedly coercive, does not amount to custody where the suspect's freedom to leave is not restricted. *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977) (*per curiam*); see also *California* v. *Beheler*, 463 U. S. 1121, 1125 (1983) (*per curiam*). A meeting with one's probation officer does not necessarily place a suspect in custody, although it could, depending on the circumstances. *Minnesota* v. *Murphy*, 465 U. S. 420, 429, n. 5, 433 (1984).

Most of the limitations on the need for *Miranda* warnings work to preserve the clarity of the decision and make it easier for police officers and courts to follow its mandate. See *Berkemer*, *supra*, 468 U. S., at 430. Others provide guidelines for lower

courts while allowing for flexibility. What has emerged is an area of the law with brightly delineated borders, within which it is murky and necessarily fact-specific.

*C. Custody as a Preliminary Question of Fact.*

The issue of custody is entirely dependent on factual determinations which, because of the variety of possible police encounters, do not conform to the type of generalization necessary for a single bright-line rule covering all situations. Unlike that of voluntariness, the concept of custody under *Miranda* does not require an appellate court's application of law in numerous cases to derive its meaning. Custody is usually an easy question. When it is not, the trial judge's ruling should be accorded deference. The issue of custody is similar to other questions of fact which are routinely decided by trial judges and reviewed for clear error. It is not a proper subject for continuous relitigation.

*1. A fact-specific determination.*

Although *Miranda* is a bright-line rule in that it automatically excludes unwarned statements given during custodial interrogation, the issue of custody, with its many variables, is not such a rule. Because there are a potentially unlimited number of police-suspect encounters that are in some way atypical, there will always be a class of cases where the determination of whether a particular encounter constitutes custody must be made on an individual basis.

In the usual and most common scenario, a suspect is arrested, often pursuant to a warrant, and taken to the police station for questioning. There is no doubt that the suspect is in custody. It was in these situations, particularly where interrogation was prolonged and the suspect completely "cut off from the outside world," that the voluntariness of a confession was questionable and for which *Miranda* was instituted. *Miranda* v. *Arizona*, 384 U. S. 436, 445 (1966).

When the facts, as in the present case, do not fit neatly into this archetype, the necessity for warnings is less clear. Before determining if *Miranda* should operate to exclude any statements, a court must first determine if the decision was implicated: it must determine if the suspect was in custody.



This Court has held that where there are many possible factual variations on a given problem, such that generalization under a particular rule is difficult or impossible, the issue should be decided by a trial judge. Cf. *Pierce* v. *Underwood*, 487 U. S. 552, 562 (1988) (trial court's determination of whether a legal position was "substantially justified" reviewed for abuse of discretion). When an issue is heavily fact-dependent, the trial court's ruling should be reviewed deferentially, even when that ruling involves the application of a legal standard. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 402-403 (1990).

In *Cooter & Gell*, this Court held that, although the applicability of Rule 11 sanctions is categorized as a question of law, in practice it is properly an issue for the trial court because it involves many " 'fact-intensive, close calls' " and because it requires a judgment on the issue of reasonableness. *Id.*, at 404-405. The fact that leaving the issue to the trial judge could lead to differing outcomes was not dispositive; the Court accepted that "some variation in the application of a standard based on reasonableness is inevitable. 'Fact-bound resolutions cannot be made uniform through appellate review, *de novo* or otherwise.' " *Id.*, at 405.

The issue of custody is, like the imposition of sanctions in *Cooter & Gell*, a fact-intensive inquiry which requires a judge to determine what is reasonable. Because this Court cannot possibly account for every encounter between a suspect and a police officer and assign to it a bright-line rule, it must at some point delegate the task of applying the rule to the trial court.

Assigning the custody decision to a trial judge will not preclude reversal of an erroneous ruling by the trial judge. Where the trial court has made a legal or factual error, review remains available, even if not *de novo*.

As this Court stated in entrusting the trial court with meting out sanctions, an appellate court can still correct legal errors. *Id.*, at 402. The standard of review on appeal for questions of fact is "clearly erroneous," see *id.*, at 400; it is not insurmountable. When the trial judge has obviously erred in admitting a confession, a reviewing court can overturn the decision on

appeal or on habeas. The "clearly erroneous" standard merely ensures that the trial court's determination of the custody issue will be accorded deference.

Allowing the trial judge to determine the issue of custody will not threaten a defendant's constitutional rights; custody by itself is not a constitutional issue. *Miranda* operates as a safeguard to narrowly protect the Fifth Amendment right against self-incrimination; the warnings themselves are not constitutionally required. *New York* v. *Quarles*, 467 U. S. 649, 654 (1984); *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974).

*Miranda* serves as a buffer zone to protect Fifth Amendment rights. Whether a defendant was in custody prior to confessing is a threshold question used in determining whether *Miranda* warnings were necessary, which is a prophylactic means of excluding a suspect's involuntary confession. When custody is questionable, its determination is two steps removed from the core constitutional issue of whether the defendant was compelled to incriminate himself. Cf. *Davis* v. *United States*, 129 L. Ed. 2d 362, 373, 114 S. Ct. 2350, 2357 (1994) (declining to "create a third layer of prophylaxis . . . when the suspect *might* want a lawyer").

Making custody a question of fact will not increase the risk of admission of an involuntary statement. When the existence of custody is unclear, voluntariness is typically a nonissue; where the defendant was arguably free to leave, there is little support for a claim of involuntariness and even less for *Miranda*'s conclusive presumption to that effect. In the rare case in which such an argument is not frivolous, the defendant can still argue involuntariness, which is reviewed *de novo*, apart from any *Miranda* claim. *Beckwith* v. *United States*, 425 U. S. 341, 347-348 (1976).

*2. Distinguished from voluntariness.*

It must be remembered that *Miranda* was intended to replace the difficult voluntariness test as the means by which trial courts ruled on the admissibility of confessions. It was not intended to replace voluntariness as a source of confusion. Yet, this is what it does if custody is constantly relitigated on appeal and habeas.



In shifting the focus from voluntariness to the *Miranda* rule, the Court turned a complex legal analysis into a fact-based inquiry. If *Miranda* is to simplify the law for police and courts while safeguarding the rights of suspects, trial judges should be allowed to determine when a suspect is in custody and in need of warnings.

To reiterate, one of the driving forces behind the *Miranda* decision was avoidance of the problematic "voluntariness" test. As one commentator stated, in enumerating the many problems with the pre-*Miranda* voluntariness or totality of the circumstances test, "[a]lmost everything was relevant, but almost nothing was decisive." Kamisar, "Probable Cause," "Good Faith," and Beyond, 69 Iowa L. Rev. 551, 570 (1984). Making custody a question of law would only lower the veil of uncertainty and indecisiveness that *Miranda* sought to lift.

In voluntariness cases, "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case . . . ." *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985). Courts still use the "totality of the circumstances" approach to make the determination. *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 417, 420, 113 S. Ct. 1745, 1751 (1993). This lack of specificity requires the rule to evolve through appellate court decisions. In such situations, this Court is reluctant to deprive the reviewing court "of its primary function as an expositor of law." *Miller*, 474 U. S., at 114.

Custody does not derive its meaning through appellate decisions. It is usually a clear-cut, unambiguous issue that requires no more than a cursory determination by the trial judge. *Ante*, at 10. Only the relatively rare situations which fall in the "gray area" are subject to dispute. The existence of these cases does not warrant continuous reshaping by appellate courts.

A second reason for *Miller* is that voluntariness goes to the heart of the Due Process Clause, and must necessarily be reviewed independently. *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). Issues such as the voluntariness of a confession, which directly implicate constitutional rights, are reviewed *de novo*. *Watts* v. *Indiana*, 338 U. S. 49, 51 (1949). The voluntariness of a confession was thought to be too important an issue to be left to trial judges.

Unlike the issue of voluntariness, custody is not of sufficient constitutional importance to require independent review. That unwarned confessions are less constitutionally significant than involuntary ones is evidenced by the use to which they may be put. Statements which violate *Miranda* may be used for impeachment purposes. *Harris* v. *New York*, 401 U. S. 222, 226 (1971). They do not taint a later, warned confession, *Oregon* v. *Elstad*, 470 U. S. 298, 312-314 (1985), and they are admissible for any purpose where exigent circumstances necessitated the interrogation. *New York* v. *Quarles*, 467 U. S. 649, 655-656 (1984). In contrast to *Miranda* violations, "involuntary or compelled statements . . . are . . . inadmissible for any purpose." *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 426, 113 S. Ct. 1745, 1759 (1993) (O'Connor, J., dissenting).

*Custis* v. *United States*, 128 L. Ed. 2d 517, 528, 114 S. Ct. 1732, 1738 (1994) is somewhat analogous here. Cases permitting collateral attack on prior convictions for *Gideon* error did not need to be extended to less fundamental claims. Similarly, *Miranda* claims are qualitatively less fundamental than voluntariness claims, and their determination can be given greater finality.

In determining that the voluntariness of a confession should be a question of law, the *Miller* Court centered on precedent. First and foremost, because prior Supreme Court decisions have treated the voluntariness issue as one of law, making it an issue of fact would require overruling past decisions, something the Court was very reluctant to do. *Miller*, *supra*, 474 U. S., at 115.

No such considerations underlie the issue of custody; this Court is writing on a clean slate. Because *Miranda* is relatively recent and this Court has never determined whether custody is an issue of fact or law, there is no tradition to be dispensed with or adhered to. As this Court has never spoken on the legal standard to be given custody, and the lower courts are divided, this Court would merely be clarifying, not changing, the law by making custody a question of fact.

Along similar lines, *Miller* found that Congress had acted in reliance on the status of voluntariness as a question of law in the 1966 amendment to the habeas statute, 474 U. S., at 115, but the



situation with *Miranda* and custody is quite different. *Miranda* was a new decision in 1966. There was no established body of case law to rely on. The only act of Congress dealing with *Miranda* is 18 U. S. C. section 3501, which seems to abrogate the decision altogether. See *Davis* v. *United States*, 129 L. Ed. 2d 362, 375, 114 S. Ct. 2350, 2358 (1994) (Scalia, J., concurring). Whatever the effect of this statute, it cannot seriously be contended that Congress has endorsed *Miranda* or required that it be a more fertile ground for reversals than is absolutely necessary.

The Ninth Circuit recognized the distinction between the voluntariness of a confession and whether a suspect is in custody for *Miranda* in the very case petitioner asks this Court to overrule: *Krantz* v. *Briggs*, 983 F. 2d 961 (1993). Krantz argued that custody should be a question of law, citing precedent that the voluntariness of a confession or a waiver of *Miranda* rights was a question of law. The Ninth Circuit acknowledged that *de novo* review was proper in the cited situations, but distinguished the issue of custody as a factual determination. *Id.*, at 963; accord *People* v. *Mickey*, 54 Cal. 3d 612, 649, 818 P. 2d 84, 99 (1991) (Mosk, J., unanimous).

In *Miller* v. *Fenton*, 474 U. S. 104 (1985), this Court acknowledged that there is no foolproof method of distinguishing a factual question from a legal one, *id.*, at 113, but it did offer some guidance. It stated that when the issue lies "somewhere between a pristine legal standard and a simple historical fact," the determination is often made by allocating the function of deciding the issue to the legal entity that is better equipped to make it. *Id.*, at 114.

Custody, like voluntariness, lies in this border zone where a detached analysis of whether factual or legal issues predominate could arguably go either way. Custody, however, does not carry the same historical baggage that *Miller* found decisive to voluntariness. Comparing custody with other baggage-free issues, we find that it resembles those that have been found to be questions of fact.

*3. Other questions of fact.*

Custody is not an issue that must be decided by every court that encounters it on review; like so many other issues that are routinely decided by trial courts, it is merely a factual component of an ultimately legal question. It is remarkably similar to the many issues that a trial judge must determine as a matter of fact and should be reviewed under the same standard.

The competency of a defendant to stand trial is a question of fact for the trial court and subject to the presumption of correctness under 28 U. S. C. § 2254(d). *Maggio* v. *Fulford*, 462 U. S. 111, 117-118 (1983) (*per curiam*). So is a defendant's competence to withdraw a habeas petition. *Demosthenes* v. *Baal*, 495 U. S. 731, 735 (1990) (*per curiam*). This is because the trial court's opportunity to personally observe the witnesses, particularly defendant, is an important factor in making these determinations. *Id.*, at 737; *Fulford*, 462 U. S., at 117-118.

The inferences which trial courts make based on their findings of fact are also entitled to a presumption of correctness on habeas or on appeal, even when the ultimate issue is one of law. *Marshall* v. *Lonberger*, 459 U. S. 422, 435 (1983) (voluntariness of guilty plea). The characterization of an event can also be an issue of fact, even where it is the ultimate issue in the case. When a trial court in a tax case found defendant's cruise to have been a pleasure trip, this Court upheld the characterization, stating that "such ultimate facts are subject to the 'clearly erroneous' rule." *Rudolph* v. *United States*, 370 U. S. 269, 270 (1962) (*per curiam*).

A finding which must be made before a conclusive presumption attaches is a finding of fact. See *Ulster County Court* v. *Allen*, 442 U. S. 140, 156 (1979) (explaining "basic" and "ultimate" facts). The underlying assumptions created by virtue of the presumption are also factual. See *ibid.*

Although the voluntariness of a guilty plea is a question of law on which a reviewing court may rule *de novo*, the findings underlying this determination are questions of fact. *Lonberger*, *supra*, 459 U. S., at 431-432. Such findings include the level of intelligence of defendant, how experienced he is with the criminal justice system, and how well he was represented by counsel. *Id.*, at 435; see also *Parke* v. *Raley*, 121 L. Ed. 2d



391, 408, 113 S. Ct. 517, 527 (1992) (presumption of correctness accorded to facts underlying prior conviction).

Even the voluntariness of a confession is only a question of law after all the underlying facts have been found; all of the circumstances to which the judge must look in making the determination are factual issues. *Miller*, *supra*, 474 U. S., at 117. The Court stressed that subsidiary questions such as "the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings" were factual issues which were "conclusive." *Ibid.*

In federal cases, the trial court must determine the admissibility of evidence pursuant to Rule 104 of the Federal Rules of Evidence. Thus, the relevance of the evidence is determined by the trial court. *Hamling* v. *United States*, 418 U. S. 87, 124-125 (1974). The reliability of evidence is also determined by the trial court, even when it requires an in-depth assessment of the validity of expert testimony and its applicability to the facts at hand. *Daubert* v. *Merrell Dow Pharmaceuticals*, 125 L. Ed. 2d 469, 482, 113 S. Ct. 2786, 2796 (1993).

The determination of whether a defendant was in custody is, like the determination of the relevance or reliability of a piece of evidence, a preliminary fact that must be decided before the evidence may be admitted. When that piece of evidence is a pretrial statement by the defendant, the custody issue is a precursor to determining whether *Miranda*'s conclusive presumption applies.

Continuous relitigation of the custody issue thwarts the very purpose of *Miranda*. By reviewing custody issues *de novo*, courts are replacing the confusion surrounding whether or not a confession was voluntary with the confusion over whether the confessor was in custody. If courts are going to routinely review the admissibility of confessions *de novo*, they may as well revert back to the voluntariness test. If, however, *Miranda* is to remain a part of the law of criminal procedure, it should be a workable rule that serves its intended purpose. The issue of custody should be decided by a trial judge and reversed only for clear error.

*D. Withrow Concerns.*

This Court recently refused to extend *Stone* v. *Powell*, 428 U. S. 465 (1976), which barred habeas review of most Fourth Amendment claims, to include *Miranda* claims. *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 413, 113 S. Ct. 1745, 1748 (1993). The most important reason cited for this holding was the finding that barring collateral review of claimed *Miranda* violations would not reduce the burden on habeas courts because prisoners could simply recast their *Miranda* claims as involuntariness claims. *Id.*, at 420, 113 S. Ct., at 1754.

*Amicus* will not ask the Court to overrule this recent decision, although one point does bear mention. The facts of the present case illustrate perfectly the fallacy of *Withrow*'s fear that barred *Miranda* claims will simply be recast as involuntariness claims, and that deciding those claims will be as much of a burden as deciding the *Miranda* claims. See *ibid*. Absent any overt coercion, when the custody question is close the voluntariness question is typically not.

Thompson *did* make an involuntariness claim in the present case, and neither the state nor federal appellate court deemed it worthy of more than cursory discussion. *Thompson* v. *State*, 768 P. 2d 127, 131-132 (Alaska Ct. App. 1989); *Thompson* v. *Keohane*, No. 94-35052 (CA9, Aug. 11, 1994) pp. 2-3 (unpublished), App. to Pet. for Cert. Thus the *Miranda* issue is pure excess baggage, in addition to the involuntariness claim and not a substitute for it. Further, the custody question is the only issue presenting any difficulty in an otherwise simple case of a clearly guilty, properly tried murderer.

Even accepting *Withrow* as precedent, that decision does not stand in the way of this Court's denying independent review to custody issues. Making custody a question of fact will actually help alleviate some of the problems this Court foresaw in *Withrow* by limiting the number of meritless involuntariness claims.

A successful involuntariness claim requires some element of government coercion. *Colorado* v. *Connelly*, 479 U. S. 157, 165-166 (1986). That element is most likely missing where the element of custody, as found by the trial court, is also absent. As the facts of the present case amply demonstrate, when the



issue of custody is subject to debate, an involuntariness claim typically borders on the frivolous.

## II. If custody is to be a question of law, the definition of custody should require a seizure.

Petitioner has chosen to brief the issue of whether he was in custody rather than remand it to the Ninth Circuit. Brief for Petitioner 43. In doing so, petitioner has raised the issue of this Court's clarifying the definition of custody "to provide additional guidance to the lower courts in the application of the 'custody' standard." *Ibid*.

If this Court decides that custody should be resolved as a question of law such that it is subject to review *de novo* on both appellate and habeas review, *amicus* requests that it further hone the definition of custody. If custody is to be a question of law, its definition should be more accessible; the line between custodial and non-custodial interrogation should be brighter. If custody must be a question of law, it should be restricted to those situations in which the suspect has been seized by the police.

Making seizure of the suspect a prerequisite to a finding of custody will provide more guidance to police officers and courts, and will benefit suspects and defendants with more uniform applications of the law. Enhancing the brightness and clarity of the rule by requiring a seizure will make *Miranda* a more effective tool for the protection of Fifth Amendment rights.

*A. The Value of a Bright-Line Rule.*

Under *Miranda*, once a suspect is found to have been subjected to custodial interrogation, the only relevant inquiry is whether he was informed of his constitutional rights. A lack of warnings furnishes a conclusive presumption of coercion and all unwarned statements are excluded, regardless of how weighty the evidence that they were voluntary. See *Miranda* v. *Arizona*, 384 U. S. 436, 458 (1966).

The *Miranda* Court recognized that not all unwarned custodial interrogations would result in confessions which were "involuntary in traditional terms." *Id.*, at 457. The decision,

however, was intended to "give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.*, at 441-442. The *Miranda* warnings obviated the need for a case-by-case analysis of whether a particular suspect was aware of his constitutional rights; such an analysis could only be "speculation," whereas "a warning is a clearcut fact." *Id.*, at 469.

Bright-line confession rules, when properly placed, reduce the risk of error involved in a case-by-case analysis. However, such rules, particularly when they are prophylactic in nature, unavoidably result in the suppression of constitutionally admissible evidence. Dix, Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis, 1993 U. Ill. L. Rev. 207, 230-231 (1993). Professor LaFave himself had this to say about bright-line rules:

> "as between a complicated rule which in a theoretical sense produces the desired result 100% of the time, but which well-intentioned police could be expected to apply correctly in only 75% of the cases, and a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90% of the time, the latter is to be preferred over the former." LaFave, The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith', 43 U. Pitt. L. Rev. 307, 321 (1982).

The advantages to bright-line rules regarding police conduct are twofold. First, they make more sense to police officers who are thus more likely to act properly. The law, it has been stated, "cannot realistically require that policemen investigating serious crimes make no errors whatsoever." *Michigan* v. *Tucker*, 417 U. S. 433, 446 (1974). Hence, the need is for a "workable rule" to reduce the "on-the-scene balancing" required of police officers. *New York* v. *Quarles*, 467 U. S. 649, 658 (1984). Given the multitude of different ways police interact with citizens, a bright-line rule is required for an officer to accurately determine the necessity of a warning so that relevant evidence may be accessed without incurring the risk of later inadmissibility.

Second, a bright-line rule is more manageable in the courts; it reduces the litigation associated with its application and promotes fairness. Dix, *supra*, 1993 U. Ill. L. Rev., at 229. In



determining admissibility, the trial court requires a clear, easily applied rule. If the standard is fuzzy, a court may improperly exclude evidence, resulting in the release of defendants who would be convicted under its proper application. Because the state generally may not appeal such a ruling, it is important that the trial court get it right the first time. The surest way is through a bright-line rule.

Yet, there are costs associated with *Miranda*'s bright-line rule. The evidence excluded is not always constitutionally inadmissible. *Oregon* v. *Elstad*, 470 U. S. 298, 306 (1985). In fact, requiring the warnings in every case excludes "trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979). Although the "gain in specificity" is said to "outweigh the burdens" associated with the rule, this is only true where *Miranda* stays within its prescribed boundaries. See *id.*, at 718-719. As Justice Cardozo's oft-quoted statement notes, "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934).

Conclusive presumptions are so inherently unfair that this Court has categorically banned their use against defendants. See *Sandstrom* v. *Montana*, 442 U. S. 510, 523 (1979). If we are to keep the balance true, a presumption against the people should, at the very least, be confined to circumstances where the fact presumed follows from the fact proven more likely than not. See *Leary* v. *United States*, 395 U. S. 6, 36 (1969); *Ulster County Court* v. *Allen*, 442 U. S. 140, 166 (1979) (standard for permissive presumptions against defendant).

The defendant is not the only party who suffers an injustice when the standard for admission or exclusion of evidence is improperly applied. When a reliable and voluntary confession is excluded from evidence, such that an admittedly guilty person is unleashed upon society, an injustice is done. This injustice is exacerbated if it is not due to the constable's blunder, but to the failure of the courts to clearly define the constable's duties under an ever-changing application of law.

If the purpose of *Miranda* is to guide both police officers and courts by replacing case-by-case decision making in the area of confessions, then the determination of whether a suspect was in custody should be more accessible. If evidence is to be excluded from the trial because of something the police did or failed to do, the boundaries between permissible and impermissible conduct should not be faintly drawn. Exclusion should be strictly limited to situations involving clearly custodial interrogation, and the rationale behind *Miranda* as a bright-line rule should be honored scrupulously. This can be accomplished by making seizure a requirement for the finding of custody that implicates *Miranda*.

*B. Coercion, Compulsion, and Custody.*

"Compel" means "[t]o necessitate or pressure by force." American Heritage Dictionary 385 (3d ed. 1992). "Coerce" means "[t]o force . . . or . . . compel." *Id.*, at 367. The essence of each is that a person is convinced by the application of force to do that which he would ordinarily avoid. The pressure may be psychological or physical.

The psychological pressure which leads to the automatic exclusion of evidence under *Miranda* is only presumed from the interaction of custody and interrogation; it is not presumed from the fact of a confession or from the presence of the suspect at the police station. *Ante*, at 6, 9. The custody and its resultant coercion must both be the products of government action; some action on the part of the police that is sufficiently coercive to be termed custody is necessary. *Colorado* v. *Connelly*, 479 U. S. 157, 170 (1986).

The coercion *Miranda* prohibits does not include that experienced by the guilty person who, upon being confronted with the gravity of his crime, feels compelled by his own conscience to confess. One's conscience, like an insane person's inner voices, does not implicate *Miranda* or any constitutional rights, regardless of its insistence. See *id.*, at 170-171. "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion . . . ." *Elstad*, *supra*, 470 U. S., at 312.



The actual perpetrator of the crime may often fear that his identity will be discovered, particularly while in the presence of police officers, and particularly while being questioned as to the extent of his knowledge about the crime. This is not necessarily custody, and it is not presumptively coercive. When the perpetrator of a crime voluntarily goes to the police station to answer questions for the purpose of averting suspicion from himself, *Miranda* does not apply. It perverts our system of justice to allow a murderer who voluntarily talks to the police, and perhaps even lies or implicates an innocent party, to later exclude any statements on the basis that he was not advised of his rights.

That a suspect does not immediately confess upon entering the police station, but does so following a lengthy dialogue, is insufficient to warrant a presumption of coercion in the absence of evidence that he was not free to leave. *Miranda* does not protect people against making choices that are against their penal interests; it protects them against the type of official coercion that leaves them with "no choice but to submit . . . ." *Minnesota* v. *Murphy*, 465 U. S. 420, 433 (1984). "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda*, *supra*, 384 U. S., at 478.

The essential predicate of the warning requirement is the "compulsion inherent in custodial surroundings." *Id.*, at 458. It is the restraint on physical freedom that forms the basis for the psychological pressure "to speak where [one] would not otherwise do so freely." *Id.*, at 467. For purposes of defining custody, the emphasis must be on the degree to which one is deprived of his physical freedom. If a suspect has not been seized, no coercion should be presumed and *Miranda* warnings should not be necessary.

*C. Seizure: A Necessary but not Sufficient Requirement.*

Seizure and custody employ a common theme, that of physical or authoritative restraint. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." *Terry v. Ohio*, 392 U. S. 1, 19, n. 16 (1968). Custody requires that one be "significantly deprived of his

freedom of action." *California* v. *Beheler*, 463 U. S. 1121, 1123 (1983) (*per curiam*).

This Court has decided against restricting *Miranda* to situations in which the defendant has been formally arrested. Although doing so would provide a bright-line rule and make *Miranda* easier for police officers and courts to administer, the Court feared that it would enable police to entirely circumvent the decision. *Berkemer* v. *McCarty*, 468 U. S. 420, 441 (1984). However, custody is defined as the restraint on freedom of the "'degree associated with formal arrest.' " *Id.*, at 440 (quoting *Beheler*, *supra*, 463 U. S., at 1125). If this Court is to continue to so define custody, yet refrain from drawing the line at a formal arrest, it should at least require a seizure.

*1. Seizure defined.*

The most recent and most thorough definition of seizure under the Fourth Amendment is found in *California* v. *Hodari D.*, 499 U. S. 621 (1991). Two police officers chased Hodari as he fled through an urban area. As he ran, Hodari threw away a small rock of crack cocaine. A moment later, an officer tackled Hodari and handcuffed him. *Id.*, at 623. The issue was at what point Hodari had been seized for purposes of excluding or admitting the drugs. *Ibid.*

The Court held that he had not been seized prior to throwing away the drugs, as he had not yielded to authority. It was only when Hodari was tackled that he was seized for Fourth Amendment purposes. *Id.*, at 626. A seizure requires either physical force or submission to a show of authority. A mere show of authority by the police officer does not constitute a seizure unless the suspect yields to it. *Ibid.*

Prior to *Hodari D.*, this Court decided *Brower* v. *Inyo County*, 489 U. S. 593 (1989). The driver of a stolen car crashed into a police roadblock which had been set up in the path of his flight. *Id.*, at 594. The Court held that he had been seized at the time of the crash, even though he had had ample opportunity to stop on his own. *Id.*, at 598-599.

The key to the finding of seizure was the intent behind the police actions which ultimately produced Brower's detention. A seizure is only effected "when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id.*, at 597 (emphasis in original). Had Brower merely lost control of the vehicle while being pursued, his subsequent crash would not have amounted to a seizure because it would have been effected through means different from those intentionally applied. *Ibid.*



Taken together, *Hodari D.* and *Brower* provide a clear definition of seizure. First, the police must intend to terminate an individual's freedom of movement through some means or instrumentality. Second, the individual must either be restrained by that method or submit to its assertion of authority. The person is seized only if both conditions are satisfied.

*2. Beyond seizure.*

Just as the definition of "seizure" has been sharpened by the Court to encompass only purposeful, effective assertions of authority, so too should the definition of custody. Without some manner of actual restraint on physical freedom, purposefully directed toward the suspect by the police, any compulsion will not rise to the level of a Fifth Amendment violation. *Miranda* warnings should thus only be required once a suspect has been seized as defined in Fourth Amendment cases.

Although the custody analysis should only begin once the suspect has been seized, it should not end there; something more than a mere seizure is required for a suspect to be in custody. This Court has so indicated in *Berkemer*, in which it held that a traffic stop, although a Fourth Amendment seizure involving detention of the driver and passengers following submission to a show of authority, did not amount to custody for *Miranda* purposes. *Berkemer*, *supra*, 468 U. S., at 436-437, 440.

The two critical factors in the Court's *Berkemer* analysis were duration and intimidation. First, the Court noted that the duration of a traffic stop is generally "temporary and brief." *Id.*, at 437. A motorist so detained can typically expect to have to answer several questions and perhaps wait while the officer verifies the license and registration. *Ibid.* This type of questioning is markedly different from custodial interrogation "which frequently is prolonged, and in which the detainee often is aware

that questioning will continue until he provides his interrogators the answers they seek." *Id.*, at 438.

Second, the attendant circumstances surrounding a typical traffic stop are such that the individual does not feel "completely at the mercy of the police." *Ibid.* Although a police officer exudes an aura of authority and is able, by virtue of this authority, to "exert some pressure on the detainee to respond to questions," this does not rise to the level of custody. *Ibid.* The typical traffic stop is "substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself . . . ." *Id.*, at 438-439 (citation omitted).

Seizure is thus a necessary but not sufficient condition for custody; it alone does not exert the kind of compulsion that *Miranda* sought to alleviate. Because custody is based on what a reasonable person would have understood, it should require a seizure plus some objective manifestations that the seizure is likely to continue for more than a brief period. Based on *Berkemer*, that something more must convey elements of detention and intimidation.

The element of detention tells the suspect and reasonable person that he is not facing a temporary delay, but a more prolonged one which he is powerless to end. The element of intimidation seems to follow from the element of detention; it tells the suspect and reasonable person that he is at the mercy of the police.

Custodial interrogation implies that questioning will continue until the suspect confesses. This is what makes it coercive. It is the "pressure on a suspect who is painfully aware that he literally cannot escape a persistent custodial interrogator." *Minnesota* v. *Murphy*, 465 U. S. 420, 433 (1984). Unless the compulsion rises to this level, *Miranda* is inapplicable. Unless the suspect has been seized such that his freedom has somehow been restricted, any compulsion will not be of the sort that implicates *Miranda*. For this reason, and to provide a bright line for police officers and trial courts to follow, custody for *Miranda* purposes should require a Fourth Amendment seizure.



## III. If Congress passes habeas reform before this case is argued, supplemental briefing should be taken on the effect of that legislation.

To reach his goal of *de novo* review of the custody question, petitioner's argument must clear three hurdles: (1) that custody is a question of law, not fact; (2) that *Miranda* issues are governed on habeas by the general rule for constitutional claims, and not the "full and fair" standard of *Stone* v. *Powell*, 428 U. S. 465 (1976); and (3) that the general rule is *de novo* review.

The first hurdle is the issue briefed in Part I, *ante*. The second hurdle was the question in *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 113 S. Ct. 1745 (1993). The third hurdle is the general rule of *de novo* review of question of law that has been followed since *Brown* v. *Allen*, 344 U. S. 443 (1953).

In *Wright* v. *West*, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992), this Court grappled with the question of whether the *Brown* rule should continue to apply to mixed questions of law and fact and came to no conclusion. That question is, of course, ultimately for Congress to resolve, cf. *id.*, at 247-248, 112 S. Ct., at 2497-2498 (O'Connor, J., concurring in the judgment), and as of this writing it appears likely that Congress will do so. On February 8, the House voted 291 to 140 to abrogate the *Brown* rule. 141 Cong. Rec. H1427 (vote on Cox Amendment to H.R. 729); *id.*, at H1433 (passed as amended 297 to 132). This question is expected to come to the floor of the Senate shortly.

If the Cox Amendment language, or something similar, becomes law, its application would fall squarely within the question presented here: the standard of review to be applied to the resolution of the questions in this case. The present case would therefore make an ideal vehicle for the prompt resolution of the issues invariably raised by new legislation: validity, retroactivity, and interpretation.

In the event that Congress changes the standard before this case is argued, as seems likely, *amicus* respectfully suggests that the Court call for additional briefing on the point.

## CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

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Respectfully submitted,

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